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NOTES.

EQUITY JURISDICTION—PROPERTY IN NEWS—UNFAIR COMPETITION—It may be regarded as definitely settled that where one at the expense of time, money, and labor has gathered news, equity will protect such person in the enjoyment of the fruits of his enterprise for a reasonable time against piracy resulting from breach of contract or trust. The reasons for affording this relief are not uniform, in some cases the remedy has been regarded as the protection of a property right; in others it has been treated as analogous to the prevention of unfair competition in trade. In the leading case in the Supreme Court of the United States, where the complaint was that the defendant was surreptitiously obtaining and making use of quotations of prices collected by the Chicago Board of Trade, the court said, in holding the plaintiff entitled to an injunction, that its right was "like a trade secret." The plaintiff had the right to keep the work it had done and the fact that others might do similar work did not authorize them to steal the plaintiffs'. The latter did not lose its right by communicating the result to persons, even if many, in confidential relation to itself, and strangers to the trust would be restrained from getting and using the knowledge obtained by inducing a breach of trust.[1]

In the recent case of the *International News Service* v. *Associ-*

[1] Board of Trade of Chicago v. Christie G. & S. Co., U. S. 236 (1905). See also, Exchange Tel. Co. v. Gregory (1896), 1 Q. B. 147; Exchange Tel. Co. v. Central News Ltd. (1897) 2 Ch. 48; Exchange Tel. Co. v. Howard, 22 Times L. R. 375 (1906); Kiernan v. Manhattan Quotation Co., 50 How.

ated Press,[2] the Supreme Court has been confronted with the problem in a new form and has rendered a judgment of the greatest importance to newspaper publishers throughout the country. Briefly, the bill was by the Associated Press to restrain the defendant from pirating its news in various ways, but the only question argued in the Supreme Court was whether the defendant could lawfully be restrained from appropriating news taken from bulletin boards of complainant's members, or from early editions of their newspapers for the purpose of selling it to defendant's clients. Complainant's news was not copyrighted and, according to complainant's contention, was not within the copyright laws. Defendant contended that upon publication on bulletin board or in a newspaper whatever right the complainant had was lost. The majority of the court in a judgment rendered by Mr. Justice Pitney took the ground that the case turned on unfair competition in business; that, although neither party had any remaining property interest as against the public in uncopyrighted news after publication, it did not follow that there was no interest as between themselves. The peculiarity of the case, as distinguished from earlier decisions was the wide extent of complainant's service. Bulletins copied in Eastern cities could be telegraphed to and published in Western papers at least as early as those served by complainant. Stripped of all disguises, said the court, the process was an interference with complainant's business at the point where the profit was to be reaped and amounted to unfair competition. "Defendant's conduct differs from the ordinary case of unfair competition in trade principally in this that, instead of selling its own goods as those of complainant, it substitutes misappropriation in the place of misrepresentation, and sells complainant's goods as its own." It may be questioned whether the complainant's rights are not put clearly in the judgment of the circuit court of appeals. There it was shown that the plaintiff corporation was really co-operative, each member contributing to the expense and having his own locality and an equal right to the result of the common enterprise, whether in New York or San Francisco. Plaintiff's service was for the benefit of all, who could not simultaneously exercise their rights; the publication in New York was a use of the news that did not destroy the rights of the other members and the rights of the complainant, as against a rival, should continue until

Pr. N. Y. 194 (1876); National Tel. N. Co. v. Western Union Tel. Co. 119 Fed. 294 (1902); Dodge v. Construction I. Co., 183 Mass. 62 (1903); Sullivan v. Postal Tel. C. Co., 61 C. C. A. 2 (1903); Board of Trade v. Cella C. Co., 145 Fed. 28 (1906); McDearmot C. Co. v. Board of Trade, 146 Fed. 961 (1906) s. c. 7 L. R. A. N. S. 889, 8 Ann. Ca. 759; Board of Trade v. Price, 213 Fed. 336 (1914); Board of Trade v. Tucker, 221 Fed. 306 (1915); Western Union Tel. Co. v. Foster, 224 Mass. 365 (1916).

[2] 39 Supreme Court Reporter 68 (Dec., 1918). Affirming Associated Press v. International News Service, 245 Fed. 244 (1917), which modified 240 Fed. 983 (1917).

the reasonable reward of each member was received, that is, until complainant's most Western member had enjoyed his reward, which was, "not to have his local competitor supplied in time for competition with what he has paid for."[3]

Mr. Justice Holmes, with whom concurred Mr. Justice McKenna, held that the only ground of complaint was in the defendant's implied misrepresentation that the news had been acquired at its own expense and that a suitable acknowledgment of the source was all that plaintiff could require. His opinion was that defendant should be enjoined from publishing news obtained from the Associated Press for a given number of hours, unless express credit was given to the Associated Press. The objection to this view is that it is too narrow in its attitutde toward unfair competition. While it is true that in many cases the test of imitation has been its effect upon the public, there are other decisions granting relief without the usual imitation elements.[4] As a practical matter of journalism it would be far more injurious to the plaintiff if the defendant labelled the appropriated news as Associated Press dispatches. The rights of the member newspapers would be even more seriously affected, since their competitors would in this manner obtain the credit of furnishing the Associated Press service without incurring the obligations of membership.

Mr. Justice Brandeis in dissenting takes issue with the other members of the court on most of the questions involved, contending that there was nothing tortious in using for purposes of gain information purchased in the open market or obtained from bulletins publicly posted. There was no unfair competition, he asserts, because the manner of obtaining the news was unobjectionable and the purpose of the defendant was not to divert the trade of the complainant, but merely to supply its own subscribers.[5] This reasoning is surprising and reminds one of that of the good highwayman of ancient stories who robs not to incommode his victims, but to give to the poor. But this is not to be over-emphasized, for the learned justice admits the injustice of the condition created by defendant's acts and argues that for equity to give relief would amount to the creation or recognition of a new private right that might work injury to the public, unless its boundaries are definitely settled, which could be better accomplished by legislation. It is evident that he favors the regulation of news collecting as a business affected with a

[3] Per Hough, J., 245 Fed. 244 at p. 250.

[4] Barnes v. Pierce, 164 Fed. 213 (1908); Fonotipia Ltd. v. Bradley, 171 Fed. 951 (1909); Prest-O-Lite Co. v. Davis, 215 Fed. 349 (1914); Searchlight Gas Co. v. Prest-O-Lite Co., 215 Fed. 692 (1914); Prest-O-Lite Co. v. Heiden, 219 Fed. 845 (1915) s. c. L. R. A. (1915) F. 945.

[5] Clark v. Freeman, 11 Beav. 112 (1848), which might support this view, "has seldom been cited but to be disapproved"; Walter v. Ashton (1902) 2 Ch. 282.

public interest, the collector to be protected only on assuming the obligation of supplying news at reasonable rates without discrimination to all papers which applied therefor. Such an attitude toward news has been established by judicial decision in Illinois,[6] but the opposite view has also been vigorously maintained. In Massachusetts, by statute, the public service commission may compel a telegraph company to furnish quotations within its control to a person properly applying for them.[7] Anyone who supplies a useful commodity to his neighbors, is, in a sense, engaged in public service and potentially subject to regulation; the question is one of degree. It is possible that the national character of the news agency may bring it within that category, although government control seems unlikely at present, in view of the vast and far more pressing problems of regulation to which the nation is committed. In the meantime is a wrong to go without a remedy because the precise name for it cannot be found in dictionary or digest?

Decided on the ground of unfair competition the case leaves us somewhat in the dark as to the exact status of collected news as property. The majority opinion evades the issue by refusing to spend time on the general question of property in news. "It has all the attributes of property necessary for determining that a misappropriation of it by a competitor is unfair competition because contrary to good conscience." On the other hand, Mr. Justice Brandeis holds that news is "not property in the strict sense," but, if treated as possessing the characteristics of property, such rights would cease with the earliest publication. Mr. Justice Holmes holds that "there is no property in the combination or in the thoughts or facts that words express. . . . Property depends upon exclusion by law from interference, and a person is not excluded from using any combination of words merely because someone has used it before, even if it took labor and genius to make it." The court was not so cautious in *Hunt* v. *N. Y. Cotton Exchange*,[8] where it was said: "It is established that the quotations are property and are entitled to the protection of the law."

W. H. L.

[6] New York Grain Exch. v. Board of Trade, 127 Ill. 153 (1889), applying the principle of Munn. v. Illinois, 94 U. S. 113 (1876). Accord: Inter-Ocean Co. v. Associated Press, 184 Ill. 438 (1900); News Pub. Co. v. Associated Press, 190 Ill. App. 77 (1914); Western Union Tel. Co. v. State, 165 Ind. 492 (1905).

Contra: Matter of Renville, 46 N. Y. App. Div. 37 (1899); Commercial Tel. Co. v. Smith, 7 Hun. 494 (1888); Wilson v. Commercial Tel. Co., 18 N. Y. St. Rep. 78 (1888); s. c. 3 N. Y. Supp. 633; Griffin v. Western Union Tel. Co., 8 Ohio, Dec. (Reprint) 572 (1883); Sterrett v. Phila. Local Tel. Co., 18 Phila. Pa. 316 (1886); s. c. 18 W. N. C. Pa. 77; Bryant v. Western Union Tel. Co., 17 Fed. 825 (1883); Marine Grain Exch. v. Western Union Tel. Co., 22 Fed. 23 (1884).

[7] Western Union Tel. Co. v. Foster, 224 Mass. 365 (1916).

[8] 205 U. S. 322 (1907).